BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEGGY A. RINKE	)	
Claimant	)	
VS.	)	
	)	Docket No. 265,920
BANK OF AMERICA	)	
Respondent	)	
AND	)	
	)	
ROYAL & SUN ALLIANCE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the August 20, 2004 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits for a 16 percent whole body functional impairment after the Administrative Law Judge (ALJ) determined that claimant's accidental injury on March 5, 2001, occurred on the premises of respondent, coming under the exception to K.S.A. 44-508(f). The Appeals Board (Board) heard oral argument on November 16, 2004.

APPEARANCES

Claimant appeared by her attorney, Randy S. Stalcup of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Terry J. Torline of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ.

It was agreed by the parties at oral argument before the Board that certain medical bills had not been provided in the record at the time of the ALJ's Award and, therefore, a determination on those medical bills had not been reached by the ALJ. Additionally, there was an indication that not all medical bills were included in the record, even at the time of the argument before the Board. The parties, therefore, requested that this matter be remanded to the ALJ at the conclusion of the Board's decision for a determination regarding what, if any, medical bills are respondent's responsibility stemming from the March 5, 2001 accidental injury.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of her employment on the date alleged?

(2) Is claimant precluded from collecting benefits for the injuries suffered on March 5, 2001, as a result of the going and coming rule contained in K.S.A. 44-508(f)?

(3) What is the nature and extent of claimant's injury? The parties acknowledge claimant has returned to work at a comparable wage and under K.S.A. 44-510e, is, therefore, limited to her functional impairment.

(4) Does K.S.A. 44-510f(a)(4) apply in limiting claimant to a $50,000 maximum award for a functional impairment?

(5) Did the ALJ fail to apply the $50,000 maximum contained in K.S.A. 44-510f(a)(4) by improperly including temporary total disability compensation in the $50,000 amount? The ALJ, in awarding claimant 80.71 weeks temporary total disability compensation, granted claimant a maximum award of $50,000, but included the temporary total disability compensation amounts in the $50,000 award.

(6) Is claimant entitled to temporary total disability compensation from March 6, 2001, until September 21, 2002, a period of 80.71 weeks?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to show the appropriate method of computing the

award, but in all other regards affirmed and remanded to the ALJ for further proceedings pursuant to the above noted stipulation of the parties.

Claimant, a several-year employee of respondent, worked at respondent's office, which was commonly known as the old Sears building located at 901 George Washington Boulevard in Wichita, Kansas. The building is owned by Argora Properties, L.P., with respondent and one other organization, Wesley Occupational Health Services (Wesley), as tenants. Respondent has approximately 300 employees working at that location, with respondent's location being a "secured" location, meaning no banking customers were physically served at this location.

The parking lot, which was owned by the same entity that owned the building, was leased to respondent with 737 parking spaces reserved in the lease for respondent. A section including 20 parking spaces was specifically reserved for the other tenant, Wesley. It was acknowledged that people parking in the Wesley location without permission would be towed away. However, people parking in the 737 spaces leased to respondent would not be towed away.

Argora Properties, the owner of both the building and the parking lot, was responsible for maintenance, lighting, security and control of the parking lot. Respondent had no responsibility other than having its employees park in the reserved sections.

On the date of accident, claimant was leaving work. She was in the parking lot, next to her car, when she slipped on a pile of sand which had been placed there as a result of icy conditions. Claimant fell, injuring her back, hip, shoulder and elbow on the right side. This was reported to her manager the following morning. Claimant first sought treatment with her family physician, Michael D. Grimes, M.D., and was later referred to Tyrone D. Artz, M.D., a board certified orthopedic surgeon, who examined her on March 26, 2001, and ordered an MRI which was performed on March 30, 2001, revealing a mild disc bulge at L4-5. Epidural steroid injections were prescribed, and claimant was referred to D. Troy Trimble, D.O., by Dr. Artz. She was also treated by numerous other health care providers, including Kris Lewonowski, M.D., who performed an L5 right hemilaminectomy on February 6, 2002. Claimant was then prescribed physical therapy and, while performing home physical therapy, fell and landed on her tailbone, which increased her pain. She returned to Dr. Lewonowski on July 12, 2002, and he recommended two caudal blocks, which claimant underwent on July 12, 2002, which provided short-term relief.

Claimant was also examined for right shoulder complaints, with impingement syndrome diagnosed and a recommended cortisone injection performed. Claimant was ultimately released by Dr. Lewonowski on September 21, 2002, and presently has returned to work for respondent at a comparable wage, performing the same job duties she was performing prior to her injuries. The parties, therefore, acknowledge that under K.S.A.

44-510e, claimant is limited to her functional impairment which, pursuant to K.S.A. 44-510f(a)(4), limits claimant to a maximum award of $50,000 for "permanent partial disability."

In the Award, the ALJ found claimant to have suffered a 16 percent impairment to the body as a whole based upon the opinions of Pedro A. Murati, M.D., board certified in physical medicine, to whom claimant was referred by her attorney, and Paul S. Stein, M.D., board certified in neurological surgery, to whom claimant was referred by respondent's attorney. Dr. Murati found claimant to have suffered a 22 percent impairment to the body as a whole on a functional basis, while Dr. Stein found claimant to have suffered a 10 percent impairment to the body as a whole on a functional basis, with both opinions being rendered pursuant to the AMA *Guides.*[1] The ALJ found no justification to give greater weight to one impairment opinion over that of the other and, therefore, awarded claimant a 16 percent impairment to the body as a whole after averaging the two functional impairment opinions. The Board, in reviewing the file, finds no reason to alter that finding and affirms the ALJ's determination that claimant has a 16 percent impairment to the body as a whole on a functional basis.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[2]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[3]

The two phrases "out of" and "in the course of" employment, as used in the Workers Compensation Act, have separate and distinct meanings, they are conjunctive and each condition must exist before compensation is allowable.[4]

> The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] K.S.A. 44-501 and K.S.A. 44-508(g).

[3] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[4] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

> employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[5]

However, K.S.A. 44-508(f) provides in part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.[6]

K.S.A. 44-508(f) bars an employee injured on the way to or from work from workers compensation coverage.[7]

The rationale for the "going and coming" rule is that while on the way to or from the work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[8]

The Kansas courts have narrowly construed the term "premises" to be a place controlled by the employer or a place where the employee may reasonably be during the time he or she was doing what a person so employed may reasonably do during or while the employment is in progress.[9] The Court of Appeals, in *Thompson*, found that neither the parking garage nor the area where the claimant, Thompson, fell, i.e., the hallway outside of the elevator, was part of her employer's premises. Therefore, the "going and coming" rule barred the claimant's recovery in that instance. The Kansas Supreme Court, in *Thompson*, provided a fairly detailed analysis of the control requirements when dealing with a premises exception to the "going and coming" rule. In *Thompson*, the employer had no control over either the area where the claimant was injured or over the parking lot where

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[5] *Newman*, 212 Kan. 562, Syl. ¶ 1.

[6] K.S.A. 44-508(f).

[7] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[8] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[9] *Thompson*, at 39.

the claimant parked her car. Several distinctions can be drawn between *Thompson* and the case at hand. In *Thompson*, there was no evidence that the employer controlled the claimant's parking in any way, other than providing a monthly parking fee. In fact, the parking area was utilized by the general public on a regular basis. It was also noted in *Thompson* that the record contained no evidence that the owner of the building, where the employer rented office space, also owned the public parking garage where the claimant parked her car. There was also no indication in *Thompson* that the claimant was directed to park in a certain area of the lot. The court found the claimant to be at no greater risk than members of the general public who used that parking garage. They found, therefore, that the public parking garage was not part of the employer's premises. The court in *Thompson*, however, discussed several cases from other jurisdictions strikingly similar to the case at hand.

In *Barnes*,[10] the claimant was injured in a parking lot adjacent to the two-story building in which her employer's offices were located. The employer leased one floor of the building. The employer in *Barnes* did not own or maintain the parking lot. However, the employer was allocated a certain portion of the lots for its employees' use. The employer specifically requested its employees park in the designated area, and it was in that designated area that the claimant in *Barnes* was injured.

In this instance, the parking lot is adjacent to the building in which claimant was employed by respondent, with respondent leasing a substantial portion of the building as well as a substantial portion of the parking lot. Additionally, respondent, in this instance, was allocated a certain portion of the lot, i.e., 737 parking spaces for its employees' use, and claimant was specifically requested to park in that designated area. It was in that designated area that claimant was injured. The court in *Thompson* specifically distinguished *Barnes*, finding that in *Barnes* the parking area was furnished by the employer's landlord, whereas in *Thompson*, that was not the case. However, in this instance, the parking area was owned by the same entity who owned the building, with the parking area being leased to respondent, a fact strikingly similar to *Barnes* and distinguishable from *Thompson*.

The Board finds in this instance that the logic of the Supreme Court contained in *Thompson* would lead one to conclude that the parking lot in this matter was part of the employer's premises and, therefore, any injuries occurring on that premises pursuant to K.S.A. 44-508(f) would constitute accidental injuries arising out of and in the course of claimant's employment with respondent. The Board, therefore, finds this claim to be compensable.

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[10] *Barnes v. Stokes*, 233 Va. 249, 355 S.E.2d 330 (1987).

As above noted, the Board has adopted the functional impairment opinion of the ALJ awarding claimant a 16 percent impairment to the body as a whole. Additionally, the Board finds that the 80.71 weeks temporary total disability compensation awarded by the ALJ is supported by the record and that portion of the award is also affirmed.

Finally, the Board must consider the language in K.S.A. 44-510f(a)(4), which limits functional impairment awards "for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof."

The ALJ limited claimant's award to $50,000 under the statute. However, the ALJ incorrectly included the 80.71 weeks temporary total disability compensation, or $32,364.71, in that $50,000 maximum figure. The language of K.S.A. 44-510f(a)(4) states in part:

> (a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
> . . .
> (4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.[11]

Respondent argues the $50,000 encompasses both permanent and temporary benefits awarded in a functional impairment case. However, the language of K.S.A. 44-510f(a), in subsections (1), (2) and (3), specifically includes temporary total disability compensation when discussing the limits set forth in those sections of the statute. Only subsection (4) of K.S.A. 44-510f(a) does not include language discussing temporary total disability compensation.

> One of the more common rules of statutory interpretation is that expressed in the Latin maxim *expressio unius est exclusio alterius, i.e.*, the mention or inclusion of one thing implies the exclusion of another. This rule may be applied to assist in determining actual legislative intent which is not otherwise manifest, although the maxim should not be employed to override or defeat a clearly contrary legislative intention.[12]

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[11] K.S.A. 44-510f(a)(4).

[12] *State v. Luginbill*, 223 Kan. 15, 574 P.2d 140 (1977) (quoting *In re Olander*, 213 Kan. 282, 515 P.2d 1211 [1973]).

> . . . when legislative intent is in question, we can presume that when the legislature expressly includes specific terms, it intends to exclude any terms not expressly included in the specific list.[13]

The Board finds the language of K.S.A. 44-510f(a)(4) to be clear and unambiguous. The $50,000 limitation applies to permanent partial disability awarded where functional impairment only is awarded. Temporary total disability compensation is not to be included in the $50,000 limit. The Board, therefore, finds that the method of computing the award utilized by the ALJ is in violation of the statute and the Award of the ALJ is modified accordingly.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated August 20, 2004, should be, and is hereby, modified to correctly compute the total amount of the award, but is affirmed in all other regards.

Wherefore, an award of compensation is hereby made in favor of the claimant, Peggy A. Rinke, and against the respondent, Bank of America, and its insurance carrier, Royal & Sun Alliance Insurance Company, for an accidental injury sustained on March 5, 2001, for a 16 percent permanent partial general disability on a functional basis. Claimant is awarded 80.71 weeks of temporary total disability compensation at the rate of $401 per week totaling $32,364.71, followed by 55.89 weeks of permanent partial disability compensation at the rate of $401 per week totaling $22,411.89, making a total award of $54,776.60.

As of the date of this award, the entire amount would be due and owing and ordered paid in one lump sum, minus any amounts previously paid.

This matter is remanded to the Administrative Law Judge pursuant to the stipulation of the parties for a determination regarding what, if any, medical bills are respondent's responsibility from the March 5, 2001 accident.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

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[13] *Matter of Marriage of Killman*, 264 Kan. 33, 955 P.2d 1228 (1998) (citing *State v. Wood*, 231 Kan. 699, 647 P.2d 1327 [1982]).

Dated this ____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director